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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1914

No. [redacted]46

MINERALS SEPARATION, LIMITED, AND MINERALS SEPARATION AMERICAN SYNDICATE, LIMITED,
Petitioners and Complainants,

vs.

JAMES M. HYDE,
Respondent and Defendant.

On Petition for a Writ of Certiorari to be Addressed to the Judges of the United States Circuit Court of Appeals for the Ninth Circuit.

RESPONDENT'S BRIEF.

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RESPONDENT'S BRIEF.

The petition for a writ of certiorari in this cause is urged by petitioners upon three grounds.

(1) That the decision of the United States Circuit Court of Appeals for the Ninth Circuit is at variance with certain judgments of the Privy Counsel of the British Empire and of the British House of Lords.

(2) That the decision of the United States Circuit Court of Appeals is in conflict with the decisions of this court upon the effect of alleged anticipatory inventions which have not gone into public use.

(3) That there is a conflict of adjudication among the different circuits of the United States upon the

effect of alleged anticipation by an invention patented subsequent to the origin of the invention in issue, but upon an application for patent filed prior to the date of the invention in issue.

We deny the validity of any of the three grounds urged by the petitioners and set forth our contentions upon the points raised as follows:

I.

The British Litigation.

The British litigation to which petitioners have referred has no relation whatever to this case, for the reason, first, that the issue involved in the British litigation was not the same as and had no relation to or bearing upon the issue of this case; second, that there is no variance or inconsistency between the judgments rendered in the British courts upon the issues there presented and the decision of the Circuit Court of Appeals upon the different issues considered by that court; and, third, that the evidence presented in the British litigation was different from that introduced in the case at bar, and the matters decided in the British litigation are matters of fact, unrelated to the present case and involve no question of law.

The British litigation was instituted by the owners of British and Australian patents granted to A. S. Elmore and F. E. Elmore for a process known as a bulk-oil process of concentrating ores, the owners of the Elmore patents charging that petitioner, Minerals Separation, Limited, infringed the Elmore patents in practicing the process described in United States patent No. 835,120 upon which Minerals Separation, Limited, instituted the present suit against respondent, James M. Hyde.

The question at issue in the British litigation was whether the process practiced by Minerals Separation, Limited, infringed the Elmore patents, and in no way involved the question of the validity or interpretation of the United States patent obtained by Minerals Separation, Limited, upon their process.

The process involved in the suit against respondent and the Elmore process are comparatively simple, and the following brief explanation thereof makes apparent the fact that there is not, and could not have been, any relation between the issues of the British suits and that of the present case.

It has been known for many years that when a mixture of ore, oil and water is agitated by a rotary stirrer or otherwise the valuable metalliferous part of the ore will float while the worthless gangue will sink. The flotation of the oiled metalliferous particles may be due to different causes, according to the amount of oil used.

If a very large amount of thick and viscous oil is used the metalliferous particles are entrapped in the oil and floated thereby, as by a boat or raft, the mixture of oil and metalliferous particles being lighter than water. The underlying cause of the separation of the metalliferous matter from the gangue is the fact that the metalliferous particles adhere to the oil while the gangue does not. The fact that the valuable metalliferous particles in the pulverized ore are attracted by and adhere to the oil, while the worthless gangue particles are not so attracted by the oil, is simply a natural phenomenon of which no satisfactory explanation has been discovered. Flotation of this character in which the metalliferous mineral particles are floated by the buoyancy of the oil can be obtained only by the use of an oil lighter than water, and the oil must be in sufficient quantity to prevent its buoyancy being overcome

by its burden of metalliferous mineral particles. Even the lighter oils, however, are only slightly lighter than water, their specific gravities ranging from 0.8 to over 0.95, as stated by petitioners' expert witness, Dr. Chandler. (Transcript, page 783.) The oil process has found its principal application to ores containing metals in the form of sulphides, such as zinc, copper and lead sulphides. To form a mixture of zinc sulphide and oil that would be as light as water, it would be necessary with oils ranging in specific gravity from 0.8 to 0.95 to use from 3 to 15.7 times as much oil by weight as zinc sulphide, as stated by petitioners' expert witness, Dr. Chandler. (Transcript, page 784.) Dr. Liebmann, another of petitioners' expert witnesses, testified that in order to make a mixture of oil and mineral of less specific gravity than water, "it always will require for average ore oil in quantity about three times the weight of ore, that is, about 6000 pounds of oil to the short ton of ore." (Transcript, p. 553.) The concentration of ores by the buoyancy of oil, as above described, has been termed in this record and is commonly known as "bulk-oil flotation," the term signifying that the oil is used in sufficient bulk or amount to actually float the metalliferous mineral by the buoyancy of the oil. The processes described and claimed in the British and Australian Elmore patents upon which the British litigation referred to by petitioners was based, are bulk-oil processes, as stated by petitioners' witnesses Ballentyne (Transcript, page 429), Liebmann (Transcript, pages 521, 522, 672), Chandler (Transcript, page 748), and as particularly stated by Dr. Liebmann (Transcript, page 522), the Elmore bulk-oil process "differs absolutely from the process of complainants' patent in suit, that it depends upon utterly different physical laws."

Long prior to the date of the alleged invention of the patent in suit it was known that agitation of an ore pulp with oil in quantities insufficient to produce oil buoyancy flotation would cause the oiled metalliferous mineral to float as a froth or scum. In various processes antecedent to the alleged invention of the patent in suit oil was used in quantities ranging from 1 per cent. to 75 per cent. by weight relative to the ore treated. These quantities are insignificant compared with the 300 per cent. necessary to produce bulk oil or oil buoyancy flotation. In these prior processes, as indicated by the patents in which they are described and as clearly shown by following the instructions given by the patentees, the floating mineral takes the form of a froth consisting of air bubbles, the walls of which are completely coated with metalliferous mineral particles, giving the froth the appearance of a dirty scum. The flotation of this froth is due, of course, to the buoyancy of the air bubbles of which it is formed, which fact is apparent from observation, and, furthermore, the flotation of the mineral could arise from no other cause by reason of the fact that the amount of oil used is insufficient to contribute the necessary buoyancy. The process of the patent upon which petitioners instituted the suit at bar against Mr. Hyde is of this nature.

In the British litigation, patents upon the Elmore bulk-oil process, and particularly upon certain refinements, such as the use of acid, were involved, and the issues before the British courts concerned solely the validity of the Elmore patents upon the bulk-oil flotation process and the refinements introduced by the Elmores. In the present case the issue was the validity of the United States patent No. 835,120, granted to Sulman, Picard and Ballot, setting forth and claiming a monopoly upon the formation of a floating metal-

liferous froth by the use of a small amount of oil, or to use the words of the patent, "a fraction of one per cent." of oil. In the present case respondent did not contend or for a moment entertain the idea that the Elmore process, in which three tons of oil are used for each ton of ore, anticipated the process of patent No. 835,120 in suit, in which but a small amount of oil is used. The only points of similarity between the Elmore process and that of the patent in suit are the use of oil and acid in the flotation process. In all other respects the processes are dissimilar. The Court of Appeals for the Ninth Circuit found them dissimilar and so stated in its opinion. The only conspicuous use made of the Elmore process in the present suit consisted in an attempt by petitioners to show that certain patents referred to by respondents as anticipating patent No. 835,120 in suit did not anticipate that patent because they disclosed bulk-oil processes like the Elmore process. The Court of Appeals for the Ninth Circuit disagreed with petitioners' contention upon this point and held, as distinctly stated in its opinion, that the anticipating patents referred to by respondent contained descriptions, not of bulk-oil process like Elmore's, but of processes for floating the mineral in the form of a froth of bubbles by the use of oil in amounts too small to float the mineral by the buoyancy of the oil itself. We quote the following from the opinion of the Court of Appeals:

> "But it is said that the appellees' process is the only froth process, and that the processes described in the prior art are the bulk flotation or oil buoyancy process. We have to inquire, therefore, what is the oil buoyancy process? It is described in the Elmore patents, No. 676,679, issued June 18, 1901, and No. 689,070, issued December 17, 1901, and in the testimony of Mr. Ballantyne, General Patent Counsel of

the Appellees. Mr. Ballantyne said that it was essential to this process, first, that the oil should be thick and viscous, for otherwise the metal would easily fall out of the oil; second, that the process be carried out in the cold, because if the oil be heated, it becomes thin, and will not entrap or float the mineral; third, that the mingling of the pulp and the oil be as gentle as possible, so to avoid breaking the oil into globules. And the appellees' expert, Dr. Chandler, testified that in the oil bulk flotation, 15.7 parts of oil must be used to 6.7 parts of ore. With these definitions and explanations of the oil buoyancy process in view, it is very plainly to be seen that in none of the patents herein discussed, aside from the Elmores' is that process used."

From the foregoing it clearly appears that the British courts decided nothing relevant to the suit at bar and had no issue before them upon which they could have decided any question involved in the suit at bar.

II.

Contention that Opinion of the Circuit Court of Appeals is in Conflict With Decisions of this Court Upon Effect of Alleged Anticipatory Inventions that Have Not Come Into Public Use.

There is no conflict upon this point. The Circuit Court of Appeals extensively analyzed the effect to be given to the extensive use or non-use of alleged anticipating inventions as will appear from that part of the court's opinion appearing upon page 1282 and upon pages 1287 to 1289 of the Record. It was properly held by the Circuit Court of Appeals in accordance with the rule as laid down in a multiplicity of cases, that while extensive use of an invention is often of value in determining the question of invention and patenta-

bility, it is referred to only for the purpose of turning the scale in cases of grave doubt, and that such considerations were of no value where the question of invention or patentability is free from doubt. Referring to cases in which evidence of extensive use has been taken into account, the Circuit Court of Appeals said that there was nothing in the present case to which such rulings apply, and that in the present case the grantees of the patent sued on had added nothing to what had previously been used by others. The Circuit Court of Appeals decided that the state of facts established by the evidence in the present case was such that the question of extensive use has no application. Upon this point the opinion of the Circuit Court of Appeals speaks for itself and shows plainly that the question of extensive public use and the law bearing thereon was fully considered, and that the court found that the evidence of anticipation and prior invention was so convincing that the question of alleged extensive use had no application.

III.

Alleged Diversity Between Circuit Courts of Appeals of Different Circuits.

The Circuit Court of Appeals for the 9th Circuit found that Sulman, Picard & Ballot, grantees of the patent sued on, were not the original and first inventors of the oil flotation process claimed in that patent. The court based its finding upon the prior operations and disclosures of several parties regarding whom evidence was introduced by respondent-defendant, among these parties being Haynes, who disclosed the process in a British patent granted to him in 1860; Everson, who disclosed the

process in a United States patent granted in 1886; Froment, who described the process in British patent No. 12,778 of 1902; Schwarz, who described the process in a United States patent granted December 19, 1905, and Kirby, who described the process in patents granted January 16, 1906, and December 18, 1906. The court also found the process described in an issue of the Engineering & Mining Journal published in 1890. The Schwarz and Kirby patents were granted subsequent to the date of filing of the application for the patent in suit, but the applications for these Schwarz and Kirby patents were filed in the Patent Office prior to the date of the application for the patent in suit.

Petitioner contends that there is a diversity of decision among the Courts of Appeals of the different Circuits upon the question whether the fact that the Schwarz and Kirby applications were filed prior to the filing of the application for the patent in suit is evidence that the grantees of the patent in suit were not the original and first inventors. There is no parol evidence in the record as to the dates of invention by Schwarz and Kirby and by the grantees of the patent in suit, the evidence as regards each of these parties consisting in the proof of the dates upon which they filed their respective patent applications in the Patent Office.

The semblance of such diversity arises only from a superficial consideration of the cases referred to by petitioner. We discuss each of the cases referred to:

Bates v. *Coe,* 98 U. S., 31. In this case the court enumerates the defenses usual in patent suits, as follows:

> "(1) That the patentee is not the original and first inventor of any material and substantial part of the thing patented. (2) That the improvement has been patented or described in some printed publication prior to the supposed invention. (3) That it had

been in public use or on sale in this country for more than two years before his application for a patent, or had been abandoned to the public."

Petitioners in their brief quote the following passage from the opinion of the court in *Bates* v. *Coe:*

> "Evidence to sustain the second defense is sufficient if the patent introduced for the purpose, whether foreign or domestic, was duly issued or the complete description of the invention was published in some printed publicaton prior to the patented invention in suit; and the patent offered in evidence or the printed publication will be held to be prior, if it is of prior date to the patent in suit, unless the patent in suit is accompanied by the application for the same, or unless the complainant introduces parol proof to show that his invention was actually made prior to the date of the patent, or prior to the time the application was filed. Neither the defendant in an action at law nor a respondent in an equity suit can be permitted to prove that the invention described in the prior patent, or the invention described in the printed publication, was made prior to the date of such patent or printed publication, for the reason that the patent or publication can only have the effect as evidence that is given to the same by the Act of Congress. Unlike that, the presumption in respect to the invention described in the patent in suit, if it is accompanied by the application for the same, is that it was made at the time the application was filed; and the complainant or plaintiff may, if he can, introduce proof to show that it was made at a much earlier date."

As explicitly stated by the court in the passage above quoted, reference was had solely to the second defense, namely, that the improvement had been patented or described in some printed publication prior to the supposed invention. We made no contention in the court below, and the court did not hold, or find it necessary to hold, that Kirby and Schwarz had patented the invention prior to the date of invention by the grantees of the

patent sued on. The Kirby and Schwarz patents bear a date of grant subsequent to that of the application for the patent in suit, but the applications for these patents were filed in the Patent Office at an earlier date than the application for the patent in suit. The earlier filing of the applications for the Kirby and Schwarz patents, therefore, constitutes proof that the grantees of the patent in suit were not the original and first inventors, as they have proved no date of invention earlier than that of the filing of their application. Respondent pleaded in defense that the grantees of the patent in suit were not the original and first inventors. The ruling of the court in *Bates* v. *Coe* is not in point. In that case the court neither passed on nor considered the evidential effect of the filing date of an application as showing that one later to file was not the original and first inventor. The court merely held that under the statutory defense that the invention covered by the patent sued on had previously been patented, a patent granted later than the date of invention of the subject-matter of the patent in suit would not invalidate the patent in suit, and that under this particular defense the date of an alleged anticipating patent could not be carried back to the application date of that patent, for the simple reason that the statute gives force only to the date of the patent itself. The discussion of this point by the court has no reference whatever to the defense that the grantees of the patent sued on were not the original and first inventors.

Drewson v. *Hartje Paper Mfg. Co.*, 131 Fed. Rep., 734—Circuit Court of Appeals for the 6th Circuit.

Electric Controller Company v. *Westinghouse Co.*, 171 Fed. Rep., 83—Circuit Court of Appeals for the 6th Circuit.

In these cases the court ruled that the date of the earlier application is evidence of prior invention by the party filing such application. These cases were cited by respondent-defendant in the court below. The rule as stated in these cases has been universally followed, so far as we are informed and believe, and there appears to be no room for doubt that as between two parties who have filed patent applications describing a certain invention, the party who filed the earlier application must, in the absence of other evidence, be considered the original and first inventor, and the existence of such earlier application must likewise be evidence that the later applicant was not the original and first inventor. There is no conflict whatever between the ruling in these cases and the ruling of this court in *Bates* v. *Coe* upon the unrelated question of the effective date of a patent introduced in evidence under a pleading which sets up the defense that the patent sued on is not valid by reason of the fact that the supposed invention had been patented at an earlier date. Obviously, as stated in *Bates* v. *Coe,* the date of a patent is the date when it was granted, but this question is quite distinct from the question as to what may properly be received as proof of the date of actual invention.

Vacuum Engineering Co. v. *Dunn,* 209 Fed. Rep., 219—Circuit Court of Appeals for Second Circuit.

In this case the validity of the patent upon which suit was brought was not in issue by reason of the fact that defendant was grantee of the patent in suit, had assigned the patent to complainant and was by these facts estopped from raising the issue of validity. Defendant, however, argued that the prior art as shown in a patent

to Schiodt necessitated a narrow interpretation of the patent sued on, thereby excluding defendant's device from the monopoly granted by the patent. The Schiodt patent was applied for prior to the date of application for the patent sued on, but was not granted until after that date, and the court held that Schiodt's invention did not become part of the prior art at the date of filing his application, which application was kept secret by the Patent Office, and only became part of the prior art at the date Schiodt's patent was granted. In the suit at bar the Kirby and Schwarz patents were not pleaded or introduced in evidence as part of the prior art, but as showing that the grantees of the patent sued on were not the original and first inventors. This is a statutory defense (Section 4920, Revised Statutes). No parol evidence was introduced regarding the date of invention by the grantees of the patent in suit or by Kirby or Schwarz. In each instance reliance was placed upon the date of filing of the application as evidence of the date of invention. In the present case the Circuit Court of Appeals of the Ninth Circuit held that the grantees of the patent sued on were not the original and first inventors by reason of the fact that the invention had been made previously by several others, among them Kirby and Schwarz. In *Vacuum Engineering Company* v. *Dunn* the court passed upon an altogether different question, the question whether an invention becomes part of the prior art at the date a patent application is filed or at the date a patent is granted. It may well be held that an invention is not part of the prior art until a patent is granted, for it is only then that the public is given knowledge of the invention, but public knowledge of an invention has no bearing upon the question of prior inventorship between two parties.

This case is not in conflict with any of those above re-

ferred to and involves no ruling whatever upon the question whether the date of filing of an application in the Patent Office is or is not evidence of the date of an invention.

Westinghouse Machine Company et al. v. *General Electric Co.*, 207 Fed. Rep., 75, Circuit Court of Appeals, Second Circuit.

The proceedings which were finally decided in this case were instituted in the form of an interference in the United States Patent Office between DeKando, who filed a patent application July 3, 1906, and Armstrong, who filed a patent application June 28, 1905, and was granted a patent on February 6, 1906. DeKando claimed priority of invention by reason of the fact that he had completed and operated the invention in Italy long prior to Armstrong's date of invention; that Waterman saw the DeKando invention operated in Italy in March, 1904, returned to the United States in May, 1904, and explained the invention to many parties in the United States prior to Armstrong's date of invention. The date of filing of the DeKando patent application was subsequent not only to Armstrong's filing date, but was several months later than the date of grant of the Armstrong patent. Upon this state of facts it was impossible for the point to arise upon which petitioners allege that there has been a diversity of decision between the different circuits. The court held that Waterman's knowledge of the invention as practiced in Italy and the imparting of that knowledge by Waterman to others in this country prior to Armstrong's date of invention was not such knowledge by others in this country as to invalidate Armstrong's patent, and, inferentially, did not constitute such a state of facts as to entitle DeKando to an effective date of

invention as of the time when Waterman returned to this country and explained to others what he had seen in Italy. In coming to this conclusion the court construed Sections 4888 and 4923 of the Revised Statutes together. The ruling in *DeKando* v. *Armstrong* has not the remotest bearing upon the question whether the date of filing of a patent application is such evidence of the date of invention as to negative a later inventor's claim to original and prior inventorship.

Even if, contrary to the fact, petitioners had shown a diversity of decision by the different Circuit Courts of Appeal upon the question raised by them, such diversity would constitute no reason for a review of this case by this court. The decision of the Court of Appeals did not hinge upon the dates upon which Kirby and Schwarz made the invention described in their patents. Kirby and Schwarz were only two among many different parties held by the court to have been prior to the grantees of the patent in suit. Had no evidence been introduced regarding the Kirby and Schwarz processes, the decision of the court would have been the same, as clearly appears from its opinion.

It is our understanding that in order to warrant the issuance of the writ prayed for the diversity of decision must necessarily relate to questions of law which are determinative of the case, as distinguished from merely accumulative statements not vital to the court's decision. In the present case the Circuit Court of Appeals held that the grantees of the patent sued on were not the original and first inventors by reason of the fact that the invention had previously been made by Haynes, Everson. and Froment, as well as by Schwarz and Kirby. If the court had held that Haynes, Everson, and Froment alone had preceded the grantees of the patent in suit, but that Schwarz and Kirby had not,

this would not have altered the court's decision. It was only necessary for the court to find that any one of the parties mentioned had preceded the grantees of the patent in suit in order to defeat petitioners in the proceedings below. As above stated, the Circuit Court of Appeals did not consider the Schwarz and Kirby patents as prior patents, but gave weight to the Schwarz and Kirby processes solely as processes that had been invented prior to the alleged invention thereof by the grantees of the patent in suit. This being the case, the question of law urged by petitioners does not arise. The question of giving the Schwarz and Kirby patents effective dates as of the dates of the respective applications therefore did not arise. The application dates of the Schwarz and Kirby patents were given effect solely as evidence of the dates upon which those parties made the invention—with regard to this no dispute was raised in the lower courts.

Inconsistent Attitude of Petitioners.

In both the District Court and the Circuit Court of Appeals petitioners-complainants distinctly admitted, in brief and argument, with regard to the Kirby and Schwarz applications that they were "filed early enough," and they raised no question upon that point. In this connection we quote the following from petitioners' reported argument in the Circuit Court of Appeals:

> "There is a conflict of authorities I think as to the effect of an application filed in the Patent Office before the application for the patent in suit and a patent issued after the application for the patent in suit. We raise no question as to that. We want an adjudication on this Kirby patent. We want to get it out of the way. We want no other defendants to be able to make use of it."

In their brief before the Circuit Court of Appeals, petitioners, after referring to the application and patent dates of the Schwarz patents, said:

> ". . . ; no point is made of this, however, nor is any question raised as to the legal aspect of an application filed in the secret archives of the Patent Office as evidence that an invention is known or used."

With regard to the Kirby patents, petitioners in their brief before the Circuit Court of Appeals, referred to the patent dates and stated:

> ". . . , but the applications were filed early enough and were put in evidence, but have not been included in this appeal record. No point, however, is made of this."

It is further to be observed that petitioners-complainants stipulated (Record, pages 802), that the dates of filing of applications for patents should be accepted in evidence as those dates appear upon the printed copies of the patents introduced in evidence. The application files of the Kirby and Schwarz patents were embodied in the record in the District Court, and upon this stipulation and the petitioners-complainants' admissions quoted above, the application papers were not included in the transcript taken to the Court of Appeals.

Law As to Patent Application Date as Evidence of Invention.

Upon the question of priority of invention the dates of filing of applications in the United States Patent Office have invariably, in the absence of other evidence, been accepted without question, the earlier applicant having always been adjudged to be the earlier inventor. It does not seem that any question could arise upon this

point, and that the citation of authorities would be unnecessary. However, it is relevant in this connection to observe that the Patent Office has always acted in accordance with this rule. In the vast majority of cases the rule is taken for granted, not only by the Patent Office, but by applicants and parties to interferences in the Patent Office. Explicit statements of the rule, therefore, do not appear in large numbers of Patent Office cases, but it is a daily occurrence for the Patent Office to refuse a patent to an applicant by reason of the existence of a patent granted later than the application under consideration by the Patent Office but upon an application filed earlier than the application under consideration. Explicit statements of this interpretation of the law by the Patent Office are found in *Ex parte Eddleblute*, C. D., 1890, pages 124-52, O. G., page 751; *Ex parte Beach*, C. D., 1897, pages 54-80, O. G., page 1476; and *Lorraine* v. *Thurmond*, C. D., 1890, page 86.

Appeals lie to the Court of Appeals of the District of Columbia from the Commissioner of Patents in *ex parte* cases, such as rejections of applications for patents, and also in *inter parte* cases, such as interferences between rival claimants for patents upon the same thing. The Court of Appeals for the District of Columbia has invariably affirmed the ruling of the Patent Office upon this point, holding the dates of applications for patents to be the effective dates of invention in the absence of other evidence. The case of *Millet and Reed* v. *Duell, Commissioner of Patents*, 18 App. D. C., 186, is an instance of the affirmance of the Patent Office practice upon this point by the Court of Appeals of the District of Columbia. The same rule has also been followed by the Federal courts, as is instanced in the following cases:

National Hat Pouncing Mach. Co. v. *Brown*, 36 F. R., 317-321.

Westinghouse v. *Chartiers Valley Gas Co.*, 43 F. R., 582.

Barnes Automatic Sprinkler Co. v. *Walworth Mfg. Co.*, 60 F. R., 605-606.

Prindle v. *Brown et al.*, 155 F. R., 531.

Automatic Weighing Machine Co. v. *Pneumatic Scale Corporation, Limited*, 166 F. R., 288.

From the foregoing it appears that petitioners' application does not set forth conditions falling within the rule laid down by this court in the following cases: *Forsythe* v. *Hammond*, 166 U. S., 504; *Lau Ow Bew* v. *United States*, 144 U. S., 47; *American* v. *Jacksonville*, 148 U. S., 372; *Fields* v. *United States*, 205 U. S., 292, and *In re Woods*, 143 U. S., 202.

Respectfully submitted,

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